

Issue: Group III Written Notice with Termination (failure to search inmate prior to leaving facility); Hearing Date: 03/05/19; Decision Issued: 03/25/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11291; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 04/08/19; EDR Ruling No. 2019-4906 issued 04/22/19; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11291

Hearing Date: March 5, 2019
Decision Issued: March 25, 2019

PROCEDURAL HISTORY

On June 21, 2019, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for failing to ensure an offender was searched prior to leaving the Facility.

On July 15, 2018, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 3, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 5, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as a Lieutenant at one of its Facilities. He began working for the Agency in June 2006. No evidence of prior active disciplinary action was introduced during the hearing.

The Inmate decided to make himself ill so that he would be taken to the Hospital where he would attempt to escape. Security staff were alerted when the Inmate was found lying on the floor in the bathroom shower at approximately 7:12 a.m. on May 10, 2018. Officer W responded to the shower. A nurse told Officer W that she believed the Inmate was having a minor heart attack. Medical and security staff rendered medical assistance to the Inmate. The LPN notified Grievant that there were several pills found on the floor next to the Inmate. At approximately 7:16 a.m., the Inmate was taken by stretcher to the Medical Unit inside the Facility. The Doctor examined the Inmate. The Doctor stabilized the Inmate. The Inmate was alert and communicating with the Doctor but not with words or sentences. When the Doctor asked the Inmate to smile or stick out his tongue, the Inmate complied. The Inmate complained that his back and neck hurt. The Doctor concluded the Inmate should be taken to the Hospital. The Inmate remained in the Medical Unit for approximately a half hour before an ambulance was requested.

The Doctor testified that inherent in calling for an ambulance is the conclusion that this was an emergency. If the Inmate was not in an emergency situation, the Inmate would have been transported using a DOC transportation van. The Doctor considered an emergency to be transportation by ambulance to a hospital while receiving direct care supervision.

Grievant was the Operations Supervisor responsible for supervising transport of the Inmate from the Medical Unit to the Hospital. Grievant was responsible for ensuring that restraints were applied properly on the Inmate and search procedures were followed prior to the Inmate leaving the Facility.

Grievant enlisted Officer W and Officer B to serve as transportation officers. The Inmate was placed in the ambulance. The Inmate was wearing jeans pants and a shirt. Grievant instructed Officer W to get inside the ambulance and check the Inmate's Flex Cuffs to determine if they were secure. Grievant did a "quick visual search" of the Inmate at the Sally Port as the Inmate laid on the stretcher in the ambulance. Officer W got into the vehicle and verified that the Inmate's Flex Cuffs and leg irons were secure. Officer W looked at Grievant to see if Grievant wanted Officer W to search the Inmate or remove his jeans. Grievant told Officer W that the Inmate was "good to go" to indicate to Officer W that no further action was necessary. Officer W did not search the Inmate based on Grievant's instruction. If Officer W had searched the Inmate, it would have involved removal and inspection of the Inmate's jeans pants.

Officer W rode in the ambulance with the Inmate. Officer B drove a transportation van behind the ambulance. After arriving at the Hospital, neither Officer B, nor Officer W searched the Inmate. The Inmate was transported from the Hospital by Med Flight Helicopter to Hospital 2. Officer W accompanied the Inmate in the helicopter to Hospital 2. Officer B drove the transportation van to Hospital 2.

Upon arriving at Hospital 2, the Inmate was taken to the Cardiac Care Unit on the tenth floor. Officer W and Officer B supervised the Inmate while he was in Hospital 2. The Hospital Doctor decided the Inmate needed a CAT scan. The Hospital Nurse told Officer W and Officer B that the Inmate's jeans had to be removed to place the Inmate in a hospital gown for the CAT scan. The Inmate heard this and removed three "shanks" from his jeans and placed them in the hospital bed linen without being observed. Officer W removed and searched the Inmate's jeans and placed them in a patient property bag. The Inmate's handcuffs had to be removed during the CAT scan but his leg irons remained secured.

After the Inmate returned to his room from the CAT scan, the Inmate told medical staff he needed an MRI because his neck and back hurt. The Inmate planned to take the shanks from his bed linen and carry out his plan of escape when he would not be in handcuffs or leg irons during the MRI. The Hospital Doctor told the Inmate he did not need an MRI. This changed the Inmate's plans for escape.

On May 11, 2018, the Inmate was discharged from the Cardiac Care Unit to another Unit. After the Inmate left his room in Hospital 2, Ms. L began to remove the bed linen and found the three shanks.¹ Upon being notified that the shanks were found in the Inmate's bed linen, the Sergeant strip searched the Inmate. A letter written by the Inmate was discovered during the search. The letter outlined the Inmate's plan of escape.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."² Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

Operating Procedure 411.1 governs Offender Transportation. Section VI(A) provides:

Prior to placing restraints on the offender, a thorough search shall take place. All offenders shall receive a strip search prior to transportation (this provision may be suspended for a medical emergency). The transportation staff is responsible to ensure that these searches are completed. Searches are to be consistent with Operating Procedure 445.1 Employee, Visitor, or Offender Searches. *** Offenders should not be dressed in the same clothing or shoes they were wearing prior to the strip search.

Section XII(A)(2) provides:

Offenders must be transported for medical care in a two piece blaze orange jumpsuit. With the approval of the Shift Commander, exceptions may be made for medical emergencies where compliance with this requirement would create an unnecessary delay.

¹ Officer W testified there were four shanks.

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁵ Under the Agency’s policies, an inmate leaving the Facility for medical care must be placed in a two piece blaze orange jumpsuit. This process would have resulted in the removal of the Inmate’s jeans pants and discovery of the Inmate’s shanks.⁶ On May 10, 2018, Grievant authorized the removal of the Inmate from the Facility without first placing the Inmate in a jumpsuit. Grievant’s actions were contrary to policy thereby justifying the issuance of a Group II Written Notice.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.) In this case, the Agency has presented sufficient evidence to elevate the disciplinary action from a Group II Written Notice to a Group III Written Notice.

Every time an inmate leaves a facility to receive medical care, the inmate is outside of a secured compound and requires a heightened level of supervision in order to ensure public safety. Grievant’s failure to ensure the Inmate was searched resulted in an Inmate who intended to escape being given the opportunity to escape. This is an extreme circumstance justifying elevation of the disciplinary action. Upon the issuance of a Group III Written Notice, an employee may be removed from employment or in lieu or removal suspended for up to 30 workdays. Accordingly, Grievant’s five workday suspension must be upheld.

Grievant argued that the policy created an exception for medical emergencies. Section VI(A) of the above policy says a search may be suspended, not that it must be suspended. Section XII(A)(2) allows a medical emergency exception to placing an inmate in a jumpsuit if doing so would “create an unnecessary delay.” There no reason to believe that searching the Inmate and placing him in an orange jumpsuit would have caused an unnecessary delay. The Inmate’s emergency was not one that would be unnecessarily delayed by placing the Inmate in a jumpsuit. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”⁷ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁶ It is most likely that the Inmate made the shanks at the Facility and attached them to the inside of his pants before leaving the Facility. This conclusion is consistent with his statements to the Agency’s investigator.

⁷ Va. Code § 2.2-3005.

officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a five workday suspension is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.